LEE CHEE KEONG A

v.

FADASON HOLDINGS SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR B
YEOH WEE SIAM J
[CIVIL SUIT NO: 22NCVC-1154-09-2012]
5 FEBRUARY 2014

CONTRACT: *Specific performance - Sale and purchase agreement - Sale and purchase of property - Developer held vacant possession but failed to deliver original individual title and all necessary documents to purchaser - Developer entered private caveat on property - Purchaser unable to register as registered owner of property - Whether sale and purchase agreement valid and enforceable - Whether there was breach of sale and purchase agreement by developer - Whether developer had caveatable interest in land* C D

CONTRACT: *Fraud - Conspiracy to defraud - Sale and purchase agreement - Sale and purchase of property - Allegation of conspiracy, breach of trust and fraud between purchaser and developer's director - Whether proven or mere suspicion* E

LIMITATION: *Contract - Counterclaim - Sale and purchase agreement - Sale and purchase of property - Developer held vacant possession but failed to deliver original individual title and all necessary documents to purchaser - Purchaser unable to register as registered owner of property - Developer entered private caveat on property - Counterclaim for declaration and order revoking sale and purchase agreement and return of vacant possession of property to developer - Whether counterclaim time-barred* F G

By a sale and purchase agreement ('SPA') executed between the purchaser ('the plaintiff'), the developer ('the defendant') and the owner of a land ('DBKL'), the plaintiff agreed to purchase and the defendant agreed to sell a property together with a double-storey terrace house at the purchase price of RM823,000. Within H 21 days from the issuance of the individual title to the property, the defendant was to execute a valid and registrable memorandum of transfer in favour of the plaintiff. The plaintiff alleged that he had paid the purchase price by cash in full to the defendant's director ('CT Lee') and CT Lee had then issued a letter of I communication to the plaintiff. The defendant then delivered vacant possession of the property to the plaintiff, enclosing the

keys to the property. The individual title was issued by the land office and the particulars of the individual title were registered under DBKL's name as the registered owner. The plaintiff contended that in breach of cl. 9(2) of the terms of the SPA, the defendant who held possession of the original individual title, failed, refused or neglected to deliver the original individual title for the property and all necessary documents to enable the plaintiff to register himself as the registered owner of the property. The defendant then lodged a private caveat against the property, preventing any dealings regarding the property. In the present claim, the plaintiff sought, *inter alia*, (i) specific performance of the SPA; (ii) original title of the individual title; (iii) letter of consent to transfer the individual title to the plaintiff; (iv) the valid and registrable transfer documents to transfer the individual title to the plaintiff, after they have been signed by the Datuk Bandar of Kuala Lumpur as the owner of the land; (v) Form 19G signed by the defendant to withdraw the private caveat; and (vi) any other documents required to complete the transfer of the individual title. The defendant counterclaimed and sought, *inter alia*, (i) a declaration and order revoking the SPA; and (ii) an order directing the plaintiff to return vacant possession of the property within 30 days from the date of the order. The issues that arose for determination were (i) whether the SPA was valid and enforceable by the plaintiff; (ii) whether there was proof of conspiracy, breach of trust and fraud by the plaintiff and CT Lee; (iii) whether there was a breach of the SPA by the defendant; (iv) whether the SPA was lawfully terminated by the defendant; (v) whether the defendant had a caveatable interest in the land; and (vi) whether the defendant's counterclaim was barred by limitation.

Held (allowing claim in part; dismissing counterclaim)

(1) The SPA was valid and enforceable by the plaintiff against the defendant. Evidence showed that the plaintiff was a *bona fide* purchaser for valuable consideration of the unit. There was consideration when the plaintiff had paid the purchase price by cash and CT Lee gave him the letter of confirmation, which could be accepted as a credit note to confirm receipt of the purchase price. (paras 17, 29, 33 & 42)

(2) The defendant requested the court to imply conspiracy, breach of trust and fraud between the plaintiff and CT Lee based on the defendant's view that it was shocking for the plaintiff to pay hard cash of the purchase price in full. In the absence of

concrete evidence, it would be against all rules on evidence to imply as such merely based on the defendant's suspicion and surmise. (para 47)

(3) The maker ('DW1') of the defendant's letter of termination failed to produce the original of such copy and only produced a photocopy of it. In the absence of such fax or post of the letter of termination, the SPA remained valid and enforceable by the plaintiff. Even if the letter of termination was faxed or posted to and received by the plaintiff, such purported termination of the SPA by the defendant was unlawful and contrary to the terms of the SPA since the plaintiff had paid the defendant the full purchase price. (paras 56 & 59)

(4) Since the SPA was valid and enforceable, the plaintiff had a registrable interest in the land within the meaning of s. 323(1)(a) of the National Land Code ('NLC') and had a right to claim title or interest in the land. It followed that the defendant no longer had such rights in the land. Without a registrable interest or any right to claim title or interest in the land, the defendant had no right to enter the private caveat on the land. The plaintiff, therefore, had a legal right or legal basis to apply for the removal of the defendant's private caveat. Furthermore, the defendant as the developer, did not own the land as DBKL is the current registered owner or proprietor of the land. The defendant's private caveat ought to be removed in accordance with s. 327 of the NLC. (paras 60, 61 & 63)

(5) The letter of confirmation given to the plaintiff was dated 3 March 2006 while the plaintiff's suit was filed on 21 September 2012. The counterclaim was filed on 31 December 2012 which was more than six years after 3 March 2006 and was therefore barred by the Limitation Act 1953. The plaintiff was a *bona fide* purchaser for valuable consideration and he was not a party to the fraud alleged to have been committed by CT Lee against the defendant. At the time of the purchase, the plaintiff did not know or had any reason to believe that CT Lee was committing fraud. Hence, the defendant could not counterclaim against the plaintiff to recover the property on account of the alleged fraud by CT Lee. (paras 66 & 69)

(6) There was no evidence by the defendant to show that the plaintiff could be adequately relieved by compensation in money in view of the defendant's breach of contract to transfer the unit to the plaintiff. The plaintiff had been having vacant possession of the unit since 31 March 2006 and in the interest of justice, the plaintiff should be given specific performance of the SPA rather than be compensated in money (paras 72 & 74)

Case(s) referred to:

ASEAN Security Paper Mills Sdn Bhd v. CGU Insurance Bhd [2007] 2 CLJ 1 FC ***(refd)***

Lee Soo You v. Pembinaan Wincon Sdn Bhd & Others [2012] 1 LNS 1085 ***(refd)***

Pekan Nenas Industries v. Chang Ching Chuen [1998] 1 CLJ 793 FC ***(refd)***

Royal British Bank v. Turquand [1856] 6 E & B 327 ***(refd)***

Score Options Sdn Bhd v. Mexaland Development Sdn Bhd [2012] 7 CLJ 802 FC ***(foll)***

Legislation referred to:

Limitation Act 1953, ss. 6(1), 29(a)
National Land Code, ss. 323(1)(a), 327
Rules of Court 2012, O. 34 r. 2(e)(ii)
Specific Relief Act 1950, ss. 11(2), 18(1)

For the plaintiff - Yeap Kim Hock; M/s Koh & Assocs
For the defendant - M Ramachandran; M/s Rama Samuel & Assocs

Reported by Najib Tamby

JUDGMENT

Yeoh Wee Siam J:

Plaintiff's Writ Of Summons And Statement Of Claim ("SOC") (encl. 1)

[1] This is the plaintiff's claim for the following reliefs in para. 13 of the SOC:

(a) specific performance of the sale and purchase agreement ("SPA") dated 21 April 2006 ie, that the defendant completes the transfer of the individual title held under PN 45729 Lot 65417 in Mukim Batu, Daerah Kuala Lumpur, Negeri Wilayah Persekutuan ("the land") ("the individual title"), to the plaintiff;

(b) an order that the defendant within 21 days from the date of judgment hands over to the plaintiff's solicitors, Messrs Koh & Associates:

(i) the original copy of the individual title;

(ii) the letter of consent to transfer the individual title to the plaintiff (which was issued by the State Authority);

(iii) the valid and registrable transfer documents to transfer the individual title to the plaintiff, after they have been signed by the Datuk Bandar Kuala Lumpur as the owner of the land;

(iv) Form 19G (Notice of Withdrawal of Private Caveat) which has been signed by the defendant to withdraw the private caveat ("the private caveat") which had been entered by the defendant *vide* Presentation No. 1703/2008 against the individual title;

(v) any other document that is required to complete the transfer of the individual title to the plaintiff (if any);

(c) as an alternative to prayer (b) (iv) above, an order that the Registrar of Land Titles Kuala Lumpur is required within seven days from the date of this order to sign all documents and take all necessary action to cancel the private caveat;

(d) an order that the defendant carries out others matters and/or all that is required to enable the plaintiff's name to be registered in the individual title so that the plaintiff is made the registered owner of the property;

(e) damages to be assessed in addition to specific performance following the breach of contract by the defendant;

(f) aggravated damages to be assessed following the wrongful entry of the private caveat by the defendant;

(g) costs of this action to be assessed; and

(h) any other relief as this Honourable Court deems just and fit.

A **The Defendant's Counterclaim (encl. 12)**

[2] The defendant's counterclaim against the plaintiff is for the following reliefs:

B (a) a declaration and order revoking the SPA dated 21 April 2006;

(b) an order directing the plaintiff to return the vacant possession of the property within 30 days from the date of the order;

(c) as an alternative to prayer (b) above, the plaintiff pays the C current market price of the property to the defendant to enable the plaintiff to continue residing and further to own and also to transfer the title and all interests in the property to the plaintiff;

D (d) costs of this action to be assessed; and

(e) other and further reliefs which this court deems just and reasonable.

Brief Facts

E

[3] By the SPA dated 21 April 2006 (CBOD1 part B pp. 19-43) executed between the plaintiff (as purchaser), the defendant (as developer) and Dewan Bandaraya Kuala Lumpur ("DBKL") (as the owner of the land), the plaintiff agreed to purchase and the defendant agreed to sell the property known as Lot No. 116 F Taman Fadason together with a double-storey terrace house thereon and bearing the address No. 1, Jalan 18/17, Off Jalan Kepong 52000 Kuala Lumpur ("the property" or "the unit") and erected on part of the master title of the land upon the terms and conditions therein.

G

[4] At all material times, the proprietor of the master title is DBKL.

[5] Among the salient terms of the SPA are:

H

(a) the purchase price is RM823,000 (cl. 3 of the SPA);

(b) within 21 days from the issuance of individual title (CBOD1 part A pp. 4-6 and pp. 7-8) to the property, the defendant is to execute a valid and registrable memorandum of transfer I ("the MOT") in favour of the plaintiff (cl. 9(2) of the SPA.)

[6] The plaintiff alleged that he has paid the purchase price in full by cash on 3 March 2006 to the defendant's Director, Lee Chee Ting ("CT Lee"). CT Lee then issued to the plaintiff the defendant's letter of confirmation dated 3 March 2006 (CBOD1 part B p. 44) ("the letter of confirmation") confirming that the purchaser has fully paid the purchase price of the property.

[7] *Vide* the defendant's letter dated 31 March 2006 (CBOD1 part B p. 45) signed by CT Lee, enclosing the keys to the property, the defendant delivered vacant possession of the property to the plaintiff.

[8] On or about April 2007, the individual title was issued by the relevant Land Office and the particulars of the individual title to the land were registered under DBKL's name as registered owner (CBOD1 Part B p. 58).

[9] The original individual title for the property is currently in the defendant's possession.

[10] The plaintiff contended that in breach of the terms of the SPA (in particular but not limited to cl. 9(2) therein), the defendant failed, refused or neglected to deliver the original individual title for the property and all necessary documents to enable the plaintiff to register himself as the registered owner of the property.

[11] On 11 February 2008 the defendant lodged the private caveat against the property thereby preventing any dealings regarding the property.

Issues

[12] The main issues in the present case are:

(1) Whether the SPA is valid and enforceable by the plaintiff.

(2) Whether there is proof of conspiracy, breach of trust and fraud by the plaintiff and CT Lee;

(3) Whether there is a breach of the SPA by the defendant;

(4) Whether the SPA was lawfully terminated by the defendant;

(5) Whether the defendant has a caveatable interest in the land; and

(6) Whether the defendant's counterclaim is barred by limitation.

Court's Evaluation And Findings

(1) Whether The SPA Is Valid And Enforceable By The Plaintiff

[13] The defendant's contention is that the defendant has no knowledge or record of the SPA. The defendant only discovered this matter when purchasers started summoning the defendant for alleged purchases of units of property from the defendant.

[14] As a result of the defendant's discovery, the defendant lodged several police reports from 2009 to 2011 (CBOD1 part B pp. 64-65, 66-67, 68, 69, 70-71, 72, 73-74 and 75) ("the eight police reports") alleging that the defendant's previous Director, CT Lee, who had been dismissed on 26 June 2007 due to indications of having committed breach of trust and misappropriation of company finances, had conspired with outside parties to commit such breach of trust and fraud against the defendant company. The defendant denied receiving the full purchase price of RM823,000 from the plaintiff.

Whether There Is Consideration

[15] The question is whether the plaintiff had paid the defendant for the unit.

[16] The plaintiff testified that CT Lee told him that if he were to pay the purchase price in full by cash ("the full purchase price") for the unit, the price would be reduced from the actual price of about RM915,000 to RM823,000.

[17] The plaintiff paid the RM823,000 by cash on 3 March 2006. He used RM300,000 of his personal savings and borrowed the balance from his mother, uncle and friends. When the plaintiff paid the full purchase price for the unit, CT Lee gave the plaintiff the letter of confirmation (CBOD1 part B p. 44).

[18] The letter of confirmation, addressed to the plaintiff, was signed by CT Lee as Director of the defendant using the defendant's letterhead. Amongst others, the letter states:

> We hereby confirm the abovementioned purchaser has fully paid the purchase price for the above said property.

[19] The plaintiff's solicitor, Lee Yee How (PW2) of Messrs Yee How & Tan, confirmed that, in mid-February 2006, he prepared the SPA for the plaintiff's purchase of the unit from the defendant. (CBOD1 part B pp. 19-43). The signatories to the SPA for the land on which the project is situated are CT Lee on behalf of the defendant, the plaintiff, and Nor Aziadiani bt Rahmat for DBKL. The SPA, duly executed by all three parties, was returned to PW2's office on 18 April 2006. PW2's firm stamped the same and on 24 April 2006 forwarded the duly stamped SPA to the defendant.

[20] The plaintiff subsequently applied for a housing loan from Hong Leong Bank Berhad ("HLBB") (CBOD1 part B pp. 46 to 53). PW2's firm was appointed to handle the loan documentation work from HLBB.

[21] PW2 wrote to the defendant for confirmation and undertakings. The defendant replied by letter dated 30 July 2006 (CBOD1 part B pp. 55 and 56). Paragraph 4 of p. 55 reads as follows:

> The purchase price amounting to RM823,000.00 has been settled in full. In this respect we have no objection to HLBB's releasing the full loan sum of RM523,000.00 directly to the above named purchaser.

[22] The defendant did deliver vacant possession of the unit to the plaintiff by its letter to the plaintiff dated 31 March 2006 enclosing the full keys (CBOD1 part B p. 45).

[23] The defendant contended that there is no evidence that it had issued to the plaintiff the credit note as required by cl. 4 of the SPA which provides:

> **Payments of Purchase Price and Loan Sum**
>
> 4. The Purchaser shall pay the Vendor the Purchase Price in full upon the execution of this Agreement which **the Vendor hereby acknowledges receipt of by the issuance of a Credit Note** in favour of the Purchaser upon execution of this Agreement. (emphasis added).

[24] The plaintiff could only show proof of payment of the full purchase price by the letter of confirmation issued by CT Lee on behalf of the defendant. The plaintiff could not show proof of any credit note issued by the defendant, as vendor. The plaintiff's

explanation for accepting the letter of confirmation is that he thought that it would be better than the usual receipt. This is because of his previous experience in a case where a company issued him a conventional receipt but after that the company closed down. The court finds the plaintiff's explanation to be a reasonable one which can be accepted.

[25] The court notes that the SPA, in particular cl. 4, does not provide for the form or format ("the format") of the credit note to be issued by the defendant. Neither did the defendant adduce evidence on the usual format of its company's credit note.

[26] There is no definition of "Credit Note" provided in the SPA.

[27] In BusinessDictionary.com, as submitted by counsel for the defendant, "credit note" has been defined as:

> **A form or letter sent by a seller to a buyer, stating that a certain amount has been credited to the buyer's account.**
>
> A credit note is issued in various situations to correct a mistake, such as when (1) an invoice amount is overstated, (2) correct discount rate is not applied, (3) goods spoil within guaranty period, or (4) they do not meet the buyer's specifications and are retuned. Also called credit memo. (emphasis added).

[28] What is important here is whether the defendant had issued to the plaintiff any receipt or document to acknowledge receipt of the plaintiff's payment of the full purchase price for the unit.

[29] Based on the above definition of a credit note, it is without doubt that the letter of confirmation given by CT Lee on behalf of the defendant, as seller, to the plaintiff, as buyer, is a credit note stating that the full purchase price had been paid. The letter of confirmation can be accepted as a "Credit Note" within the meaning of cl. 4 of the SPA to confirm the defendant's receipt of the RM823,000 paid by the plaintiff.

[30] The defendant submitted that it is shocking for the plaintiff to pay hard cash of RM823,000 and the plaintiff did not prove how he raised the money to pay the sum to CT Lee.

[31] In *Pekan Nenas Industries v. Chang Ching Chuen* [1998] 1 CLJ 793 the Federal Court did not think that there was anything suspicious when cash of RM100,000 was paid for the purchase

of an option in Singapore and a personal receipt was given. In fact, the Federal Court regarded the criticism of the Court of Appeal on such matter as unduly severe.

[32] In my view, even though it appears to be unbelievable for the plaintiff to pay the sum of RM823,000 by cash, the fact is that CT Lee gave the plaintiff the letter of confirmation thereby proving receipt of such cash. It is not necessary for the plaintiff to prove how he raised the cash so long as he can show proof of payment by CT Lee's letter of confirmation. In any case, the court takes note of the fact that, after the SPA was executed, the plaintiff did apply for a housing loan of RM530,000 from HLBB.

[33] In the present case, the court finds that there is consideration when the plaintiff paid the full purchase price of RM823,000 to the defendant through CT Lee. Subsequently, the SPA was duly executed by the three signatories and the SPA was stamped. Therefore, the SPA is valid and enforceable by the plaintiff against the defendant.

CT Lee's Position And Authority

[34] At all material times, CT Lee was the Director of the defendant company. This was confirmed by the evidence of Nor Azmi bin Mat Ludin (DW1), the general manager of the defendant since May 2007.

[35] DW1 confirmed that CT Lee was one of the defendant's Directors who was given the duty for the sales and marketing of all the units in the project for Phases 1, 2, 3, 4A1, 4A2, 4B1 and 4B2 from the time the project was launched in the early 1990s until the time when he was dismissed. CT Lee also had full control of all financial matters, the office and all officers of the defendant in the Marketing and Sales Division of the defendant.

[36] The effect of DW1's admission is that all the documents and letters signed by CT Lee (CBOD1 part B pp. 44, 45, 54, 55 and 56) are binding on the defendant.

[37] At all times, CT Lee had held himself out as the Director of the defendant and that he had the actual authority of the defendant to deal with the plaintiff.

[38] In *Royal British Bank v. Turquand* [1856] 6 E & B 327, the Indoor Management Rule, or the *Turquand* Rule, as propounded by the court, laid down the principle that a person dealing with a

company need not enquire into the regularity in the internal affairs and proceedings of the company and may assume that all being done had been done regularly (see also *Lee Soo You v. Pembinaan Wincon Sdn Bhd and Others* [2013] 3 MLRH 614, and [2012] 1 LNS 1085).

[39] The defendant submitted that CT Lee's letter in CBOD1 part B pp. 44, 45, 54, 55 and 56 are all inadmissible since the plaintiff did not produce CT Lee as a witness for cross-examination on the contents of such letters.

[40] It must be borne in mind that CT Lee's letters have, by agreement of both parties after case management, been filed in the common bundle of documents ("CBOD") in part B, which means, under O. 34 r. 2(e)(i) of the Rules of Court 2012 ("the ROC"), they are "documents where the authenticity is not disputed but the contents are disputed". The question of admissibility of the documents do not arise. Thus, there is no requirement for the plaintiff to prove the authenticity or the making of such documents. It is left entirely to the plaintiff or defendant to decide whether to call CT Lee as a witness for cross-examination on the contents of the documents. The weight to be attached to the contents of the documents would have to be assessed and given by the court. Here, the plaintiff chose not to call CT Lee as a witness.

[41] The defendant also did not call CT Lee as its witness to rebut the whole of the plaintiff's evidence.

[42] In the absence of any evidence to the contrary to rebut the contents of CT Lee's letters, the court accepts those documents on the face of their record. The court finds CT Lee's letters self-explanatory. They show clearly that CT Lee had acted on behalf of the defendant in his capacity as the Director of defendant company. The plaintiff had no reason to doubt that CT Lee had no authority to act on behalf of the defendant or to sign all those letters and the SPA.

[43] The evidence shows that the plaintiff is a *bona fide* purchaser for valuable consideration of the unit. There is no evidence that the plaintiff was not acting *bona fide* in his dealings with CT Lee and/or the defendant. The plaintiff can therefore rely on the Indoor Management Rule or the *Turquand* Rule.

[44] The defendant cannot now deny the validity and enforceability of the SPA.

Whether There Is Proof Of Conspiracy, Breach Of Trust And Fraud By The Plaintiff And CT Lee

[45] In *ASEAN Security Paper Mills Sdn Bhd v. CGU Insurance Bhd* [2007] 2 CLJ 1 the Federal Court held that the standard of proof required where there is an allegation of fraud in a civil proceeding must be one of beyond reasonable doubt, and not on a balance of probabilities.

[46] The defendant lodged the eight police reports on 17 April 2009, 6 August 2009, 28 August 2009, 14 January 2010, 5 April 2010, 30 August 2010 (first report in 2010), 30 August 2010 (second report in 2010) and 18 January 2011, about three to five years after the SPA was executed on 21 April 2006. Nowhere in any of the police reports did the defendant state the name of the plaintiff and the unit that the plaintiff had purchased. Neither did the police reports state specifically that the plaintiff was in conspiracy with CT Lee to enable CT Lee to commit breach of trust, misappropriation of the defendant's monies and fraud against the defendant company. Both the defendant's witnesses, DW1 and DW2, did not give any evidence of such alleged conspiracy, breach of trust and fraud.

[47] The defendant is requesting the court to imply conspiracy, breach of trust and fraud between the plaintiff and CT Lee based on the defendant's view that it is shocking for the plaintiff to pay hard cash of RM823,000 for the full purchase price of the unit and that no credit note was issued by the defendant to the plaintiff. In the absence of concrete evidence, it would be against all rules on evidence for the court to imply conspiracy, breach of trust and fraud merely based on the defendant's suspicion and surmise.

[48] Vasanthi a/p Ramadass (DW2), the defendant's legal manager from May 2009 to October 2010, informed the court that she had lodged five of the eight police reports. Thus far, the police did not charge anyone. The defendant filed some civil suits against CT Lee but DW2 does not know the outcome of the suits since she left the defendant's employment in October 2010.

[49] The defendant did not produce the cause papers of its civil suits filed against CT Lee. Neither is the court informed of the outcome of those suits.

[50] The court finds that on record there is no evidence at all, let alone proof beyond reasonable doubt, of conspiracy, breach of trust and fraud committed by CT Lee together with the plaintiff to vitiate the SPA and to render it unenforceable.

Whether There Is A Breach Of The SPA By The Plaintiff; and

Whether The SPA Was Lawfully Terminated By The Defendant

[51] The plaintiff had paid the full purchase price for the unit. The SPA was duly executed by the three signatories and then stamped. The defendant had given the keys and therefore vacant possession of the unit to the plaintiff *vide* CT Lee's letter dated 31 March 2006 (CBOD1 part B p. 45).

[52] As submitted by counsel for the plaintiff, the plaintiff had repeatedly and *via* his solicitors' letters, including one from Messrs Koh & Associates dated 23 February 2012, demanded that the defendant deliver the following documents:

(a) the original individual title to the property;

(b) the letter of consent to transfer from the appropriate authority;

(c) a duly executed, valid and registrable MOT for the transfer of title from DBKL to the plaintiff;

(d) a withdrawal of private caveat form;

(e) all other necessary documents to enable the plaintiff to register his name onto the individual title, but the defendant failed, refused or neglected to do so (CBOD1 part A pp. 9, 11, 12, 13 and 14, 15 and 16, and 17 and 18).

[53] The defendant is therefore in breach of the terms of the SPA, in particular but not limited to cl. 9(2) therein which provides:

> 9(2) Upon the issue of the separate document of title to the said Lot and subject to the payment of the purchase price by the Purchaser to the Vendor in accordance to clause 4(1) and 4(2)

and the observance of all the terms and conditions herein provided, the Vendor shall, within twenty-one (21) days, execute a valid and registrable memorandum of transfer of the said Property to the Purchaser, his heir or nominee or lawful assign, as the case may be.

[54] The defendant contended that it no longer has any obligations to fulfil the terms of the SPA since it had by its letter to the plaintiff's solicitors, Messrs Yee How & Tan dated 10 July 2009 (CBOD1 part C p. 76) "terminated/rescinded" the SPA ("the letter of termination").

[55] The court notes that the defendant's purported letter of termination is a part C document which means under O. 34 r. 2(e)(ii) of the ROC its "authenticity and contents are disputed".

[56] DW1 came to court to confirm that he is the maker of the defendant's letter of termination. However, DW1 could not produce the original of such letter ie, the defendant's duplicate copy. DW1 only produced a photocopy of the letter of termination. He stated that it is the defendant's practice not to keep a duplicate copy of the original of its letters but to keep only a photocopy and he produced the photocopy which is in the defendant's file.

[57] The court did not allow the admission of the photocopy of the letter of termination in the absence of the duplicate copy of the original letter being produced.

[58] It is stated in the defendant's purported letter of termination at the top right hand corner "By fax: 6203 6862 & Post". However, the defendant failed to prove that it had faxed or posted the letter to Messrs Yee How & Tan. PW2 confirmed that his firm did not receive the letter of termination either fax or by post.

[59] In the absence of such fax and post of the letter of termination by the defendant to the plaintiff, the SPA remains valid and enforceable by the plaintiff. In any case, even if the letter of termination was faxed or posted to and received by the plaintiff, such purported termination of the SPA by the defendant is unlawful and contrary to the terms of the SPA since the plaintiff had paid the defendant the full purchase price.

A **Whether The Defendant Has A Caveatable Interest In The Land**

[60] The court has found in the above that the SPA is valid and enforceable since the plaintiff had paid the full purchase price to
B the defendant. The plaintiff therefore has a registrable interest in the land within the meaning of s. 323(1)(a) of the National Land Code ("the NLC") and has a right to claim title or interest in the land. It follows that the defendant no longer has such rights in the land. Without a registrable interest, or any right to claim title
C or interest in the land, the defendant has no right to enter the private caveat on the land. The plaintiff therefore has a legal right or legal basis to apply for the removal of the defendant's private caveat.

D **[61]** Furthermore, it must be noted that the defendant, as the developer, does not own the land in the first place. DBKL is the current registered owner or proprietor of the land. As submitted by counsel for the plaintiff, the defendant's interest is not in the property, but in the purchase price of the property.

E **[62]** In the Federal Court decision, *Score Options Sdn Bhd v. Mexaland Development Sdn Bhd* [2012] 7 CLJ 802, Arifin Zakaria CJ stated:

> Held (2) … in the present facts herein, what the respondent had
F under the (joint venture) Agreement was not any share in the subdivided lots or units of buildings on the Land, but merely a share in the profits under the GDV (Gross Development Value). It was merely a share in the profits and not in the land.
>
> (4) … Therefore although the appellant had conferred
G numerous rights on the respondent under the (Joint Venture) Agreement and the Powers of Attorney, all these rights were merely rights to develop the Land that would give rise to the monetary interest, ie, a right *in personam* against the appellant and does not create any interest in the Land. Under the NLC, these rights are not capable of registration.

H **[63]** Applying the principle in the above Federal Court decision to the present case, this court holds that since the defendant's right to develop the land does not confer a registrable interest in the land, the defendant's private caveat ought to be removed in
I accordance with s. 327 of the NLC.

Whether The Defendant's Counterclaim Is Barred By Limitation

[64] In para. 27 of the plaintiff's reply to defence and defence to counterclaim (BOP p. 42), the plaintiff pleaded limitation.

[65] Under s. 6(1) of the Limitation Act 1953, the limitation period for filing an action founded on a contract or on tort is the expiration of six years from the date on which the cause of action accrued.

[66] The letter of confirmation given to the plaintiff is dated 3 March 2006. The plaintiff's suit was filed on 21 September 2012 but the counterclaim was filed on 31 October 2012. The counterclaim was filed more than six years after 3 March 2006 and therefore it is barred by the Limitation Act 1953.

[67] The defendant failed to prove fraud by the plaintiff jointly with CT Lee. Thus, s. 29(a) of the Limitation Act 1953, which provides for the period of limitation to begin to run from the date of discovery of the fraud, does not apply here.

[68] Even if there is fraud committed by CT Lee against the defendant, but not committed by the plaintiff, proviso (i) to s. 29 of the Limitation Act 1953 provides as follows.

> Provided that nothing in this section shall enable an action to recover, or enforce any charge against, or set aside any transaction affecting, any property which:
>
> (i) in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed.

[69] The plaintiff is a *bona fide* purchaser for valuable consideration. He is not a party to the fraud alleged to have been committed by CT Lee against the defendant. At the time of purchase, the plaintiff did not know or have any reason to believe that CT Lee was committing fraud. Therefore, the defendant cannot counterclaim against the plaintiff to recover the property on account of the alleged fraud by CT Lee.

A

Reliefs To Be Granted To The Plaintiff

[70] The plaintiff's claim, *inter alia*, is for specific performance of the SPA, general damages for the defendant's breach of contract, and aggravated damages for the wrongful entry of the private caveat by the defendant.

B

[71] Section 11(2) of the Specific Relief Act 1950 ("the SRA") provides:

> 11(2). Unless and until the contrary is proved, the court shall presume that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money, and that the breach of contract to transfer movable property can be thus relieved.

C

D

[72] There is no evidence by the defendant to show that the plaintiff can be adequately relieved by compensation in money in view of the defendant's breach of contract to transfer the unit to the plaintiff. The plaintiff has been having vacant possession of the unit since 31 March 2006. In the interest of justice, the plaintiff should be given specific performance of the SPA rather than to be compensated in money.

E

[73] Section 18(1) of the SRA further provides:

> 18(1). Any person suing for specific performance of a contract may also ask for compensation for its breach, either in addition to, or in substitution for, its performance.

F

[74] The plaintiff did not prove that he had suffered any damages as a result of the defendant's breach of the SPA and the wrongful entry of the private caveat on the land. The court is of the view that the remedy of specific performance is sufficient and there is no necessity to award the plaintiff with general damages and aggravated damages in addition to specific performance of the contract.

G

H

Defendant's Counterclaim

[75] In view of the court's above findings regarding the plaintiff's claim, consequentially the defendant' counterclaim is without merit and cannot be allowed.

I

Decision

[76] Based on the above considerations the court orders as follows:

(a) The plaintiff's claim in the SOC is allowed except for prayers 13(e) and (f).

(b) The defendant's counterclaim is dismissed.

(c) Costs of RM20,000 are to be paid by the defendant to the plaintiff for both the plaintiff's claim and the defendant's counterclaim.

Test Case

[77] Counsel for both parties, ie, the respective plaintiff/purchaser and the same defendant/vendor in three other similar actions, namely, Civil Suit No. 22NCVC-1155-09/2012 (encls. 1 and 10), Civil Suit No. 1156-09/2012 (encls. 1 and 10) and Civil Suit No. 1157-09/2012 (encls. 1 and 11) ("the three other civil suits"), have agreed and confirmed with the court during case management on 10 July 2013 (see court order in encl. 23) that the decision of this court for the present case would be binding on the three other civil suits, with the necessary modifications. Therefore, with this decision being given by the court on this case, it automatically disposes of the three other civil suits.